



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 7, 2003

Mr. David B. Casas
Assistant City Attorney
City of San Antonio
P.O. Box 839986
San Antonio, Texas 78283-3966

OR2003-0833

Dear Mr. Casas:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176111.

The City of San Antonio (the "city") received a request for information relating to a specified city employee. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered the requestor's comments, which the city has forwarded to us. *See Gov't Code § 552.304* (providing for submission of public comments).¹

We begin by addressing section 552.007 of the Government Code. This section provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See Gov't Code 552.007*; Open Records Decision No. 518 at 3 (1989).

The submitted documents and our records indicate that a portion of the information at issue may have previously been released to a member of the public. If the city voluntarily disclosed this information to a member of the public, the city may not now withhold such information unless its release is expressly prohibited by law. *See Gov't Code § 552.007*.

¹We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988)*. This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You assert that the submitted information is excepted under section 552.103 of the Government Code. This section is a discretionary exception and does not constitute law prohibiting the release of this information. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). We have marked information that appears to have been released. To the extent the marked information was previously released, it may not be withheld under section 552.103 and must be released to the requestor.

We next note that the majority of the remaining submitted information is subject to section 552.022 of the Government Code. This section provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

Gov't Code § 552.022(a)(1). The remaining submitted information consists primarily of completed investigations made of, for, or by the city. As noted above, section 552.103 is a discretionary exception; as such, it does constitute "other law" for the purpose of section 552.022. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; ORD 663, 522. Therefore, the submitted information that we have marked as being subject to section 552.022 may not be withheld on the basis of section 552.103. We note, however, that the records subject to section 552.022 include information encompassed by sections 552.101, 552.117, 552.130, and 552.137, and we will address those exceptions.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the doctrine of common law privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common law privacy protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Id.* We have reviewed the submitted information that is subject to section 552.022 and conclude that a small portion of it is protected by common law privacy. *See generally* Open Records Decision Nos. 470 (1987) (common law privacy protects information concerning illness from severe emotional and job-related stress), 455 (1987) (common law privacy protects information concerning prescription drugs, illnesses, operations, and physical handicaps). We have marked the private information that must be withheld under section 552.101.

The documents that are subject to section 552.022 also include personal information relating to a city employee. Section 552.117(1) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, if, prior to the receipt of this request, this individual elected to keep his personal information confidential, you must withhold it under section 552.117. We have marked the information that you must withhold if the individual made a timely election.

Regardless of whether the employee made a timely election under section 552.024, his social security number may be confidential under federal law and thus excepted from disclosure under section 552.101. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We have no basis for concluding that the social security number at issue is confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law, enacted on or after October 1, 1990.

The records that are subject to section 552.022 also include information pertaining to motor vehicle records. Section 552.130 of the Government Code provides that “[i]nformation is excepted from [required public disclosure] if the information relates to: (1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state; [or] (2) a motor vehicle title or registration issued by an agency of this state[.]” We have marked the types of information that you must withhold under section 552.130.

In addition, the documents encompassed by section 552.022 include email addresses of members of the public. Section 552.137 of the Government Code provides that “[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act].” Section 552.137 does not apply to a business’s general e-mail address or a government employee’s work e-mail address. We have marked the types of e-mail addresses that must be withheld pursuant to section 552.137 unless their owners have consented to their release. As you claim no other exception for the documents that are subject to section 552.022 and they are not otherwise confidential by law, they must be released.

We now address your claim under section 552.103 of the Government Code for the information that is not subject to section 552.022. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.-Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a).

You state, and have submitted documents showing, that the employee who is the subject of the present request is a defendant in a pending lawsuit in district court in Bexar County. You inform us that the employee is party to the suit as a consequence of his employment with the city. Based on your statements and our review of the information at issue, we agree that the remaining submitted information relates to pending litigation.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, any information that was previously voluntarily released to any member of the public must be provided to this requestor. We have marked the documents that are subject to section 552.022. We have marked private information in these documents that the city must withhold under section 552.101 and the common law right of privacy. In addition, the city must redact from such documents the marked motor vehicle records and e-mail addresses under sections 552.130 and 552.137 respectively. Certain marked information must also be redacted from such documents pursuant to section 552.117 if the employee at issue made a timely election under section 552.024. If no such election was made, the city must redact social security numbers only if obtained or maintained pursuant to a law enacted on or after October 1, 1990. After redacting the preceding types of information, the city must

release documents that are subject to section 552.022. The requested information that is not subject to section 552.022 may be withheld under section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

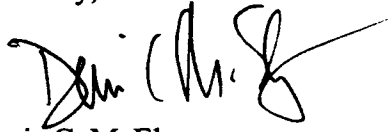
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Denis C. McElroy", with a long, sweeping horizontal line extending to the right.

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 176111

Enc. Submitted documents
Letters dated February 9, 1999 and January 14, 2000

c: Ms. Darlene Canales
225 Glentower
San Antonio, Texas 78213
(w/o enclosures)